No. 415

In the Supreme Court of the United States

OCTOBER TERM, 1957

COUNTY OF MARIN, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinions of the district court (R. 111, 119) are reported at 150 F. Supp. 619. The report of the Interstate Commerce Commission (R. 8) is reported at 65 M. C. C. 347.

JURISDICTION

The final judgment of the district court was entered on May 3, 1957 (R. 124–125). Notice of appeal was filed on May 29, 1957 (R. 126–128). Probable jurisdiction was noted on November 12, 1957. (355 U. S. 866). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 43–46.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission has jurisdiction under Section 5 of the Interstate Commerce Act to authorize an interstate motor carrier to transfer part of its intrastate and interstate operating rights to a noncarrier, which thereupon would become a carrier, and, in exchange, concurrently acquire control of the latter company through acquisition of its stock.

2. Whether it was an abuse of discretion for the district court to deny a motion to amend the complaint in order to challenge the Commission's findings, where the complaint had raised only the jurisdictional question, where the first indication that such an amendment would be sought was during oral argument of that question, and where there was no showing of lack of knowledge, mistake, or inadvertence on appellants' part.

STATEMENT

Involved in this proceeding are the suburban-commuter operating rights of the Pacific Greyhound Lines ("Pacific"), together with certain closely related interstate operating rights. These operating rights, which Pacific seeks permission to transfer to a separate but wholly-owned subsidiary company, represent 3.08 percent of Pacific's total route miles, account for 7.44 percent of its bus miles operated,

produce 9.16 percent of its gross passenger revenue, and account for 35.49 percent of the total passengers transported by Pacific (R. 11). Under the proposed transaction, Golden Gate Transit Lines ("Golden Gate"), which was incorporated on May 7, 1953, would acquire these operating rights and certain related properties in exchange for all its outstanding capital stock (R. 11–12). The Greyhound Corporation ("Greyhound"), which at the time of the application controlled Pacific through ownership of a majority of its capital stock (R. 9),[1] would acquire concurrent control of Golden Gate and of the operating rights and properties to be acquired by it as a result of the transaction.

The purpose of the transaction is to resolve a number of recurring problems arising from the operation of this largely local commuter service by Pacific in conjunction with its intercity long-haul operations (R. 19–21). In approving the transaction as consistent with the public interest, the Commission found that the local and intercity operations differ with respect to the nature of the services provided, the type of passenger carried, the mileage involved, and the type of equipment used; that Pacific's public relations had suffered because of labor problems arising primarily from the local operations; and that Pacific's management has had to devote more time and energy to these operations than are commensurate with the comparative traffic and revenue producing results of that service (R. 27–28). It found that the same service

[1] Pacific Greyhound and Greyhound have since been merged.

now rendered by Pacific would be provided by Golden Gate; that the same facilities would be available; and that interstate passengers would, as now, have the option of riding on either intercity or local buses where the routes coincide.

Based on these and other findings, the Commission concluded: "A new corporation with a completely separate management, experienced in 'local' mass transportation, will be able to confine its attention to that service and thus conduct those operations more efficiently than the present management, whose main interests are concerned with the long-haul operations. * * * As Golden Gate's management would be more familiar with local conditions and more disposed to study the particular needs of its patrons, the probabilities of adjustments to provide better service and eliminate causes of any existing complaints would be increased. Ultimate integration into the contemplated rapid transit system should be facilitated" (R. 28–29).

The Commission approved the proposed transaction as consistent with the public interest, on terms and conditions which provided, among other things, that Pacific increase its cash payment to Golden Gate by $100,000, to a total of $250,000; that certain duplicating operating rights of Pacific be cancelled; that Golden Gate amortize within a three-year period the amount assigned to its "Other Intangible Property" account as a result of the transaction, and that the Commission reserve jurisdiction for a period of two years in order to make such additional findings and to

impose such terms and conditions as may be necessary to protect the rights of affected employees (R. 31–32).

Before the Commission, appellants and representatives of affected employees vigorously asserted that the proposed transaction would not be consistent with the public interest. The report indicates that the Commission carefully considered these grounds of objection and found them not to be persuasive (R. 23–30). The same parties also urged that because Golden Gate was not, at the time, an existing carrier, the transaction was not one over which the Commission had jurisdiction under Section 5 (2) (a) of the Act (R. 22–23).

The complaint asking that the Commission's order be set aside raised only the jurisdictional issue. After the United States and the Commission had filed an answer and a motion for judgment on the pleadings, and after the intervening appellees had filed a motion to dismiss the complaint for failure to state a cause of action, the matter came on for oral hearing before the three-judge court on February 23, 1956. During this argument appellants' counsel for the first time indicated an intention to seek leave to amend the complaint in order to challenge the Commission's findings of fact, stating that permission to amend would be sought "in the event the determination of the Court should be against us on the legal question" (R. 101). The motion for leave to amend, which was filed five days later, was orally argued before the court on April 20, 1956.

In its opinion of April 12, 1957, the court held that the complaint should be dismissed and that the motion to amend the complaint should be denied (R. 111–118). In a separate opinion, Judge Harris concurred in the decision sustaining the jurisdiction of the Commission but dissented from the refusal to grant appellants permission to amend their complaint (R. 119–124). Subsequently judgment was entered dismissing the complaint with prejudice (R. 124–125).

SUMMARY OF ARGUMENT

I

Under the terms of Section 5 (2) (a) of the Interstate Commerce Act, Commission approval is required where a motor carrier seeks to acquire control of another motor carrier (except where not more than 20 vehicles are involved). Other provisions of Section 5 make it plain that the Commission's jurisdiction extends to acquisitions of control however the result is attained, and covers carriers participating in or resulting from the transaction. Accordingly, the Commission properly concluded, as the court below unanimously held, that its approval was required of a transaction whereby Pacific sought to transfer certain of its interstate and intrastate operating rights to Golden Gate, over which it would simultaneously obtain control through acquisition of all of Golden Gate's capital stock.

The decisions of this Court establish that jurisdiction under Section 5 embraces the control relationships resulting from consummation of the proposed trans-

action. Since admittedly Pacific will acquire control of Golden Gate, another carrier, it is immaterial that Golden Gate was not an existing carrier prior to the transaction or that the operating rights involved may have been held previously by Pacific.

The long-standing consistent administrative construction of Section 5 by the Commission, that it applies to transactions involving the segregation of dissimilar services into separate but wholly-owned subsidiary companies, is entitled to great weight. In addition, the conclusion that the section is not limited to transactions between existing carriers, but applies as well to transactions which will result in one carrier acquiring control of one which comes into existence by reason of the transaction, finds support in the judicial decisions construing comparable control provisions of the Civil Aeronautics Act.

The fact that in the instant case the operating rights involved are for the most part the local commuter rights of Pacific in the San Francisco Bay Area does not detract from the Commission's jurisdiction to approve the whole transaction under Section 5. Section 5 (11) provides that the authority conferred upon the Commission shall be exclusive and plenary and that upon approval of the Commission the transaction may be carried into effect without invoking any approval under State authority. This Court has recognized that by reason of this provision the Commission's jurisdiction extends to approving a transaction even though contrary to state law, *Seaboard R. Co.* v. *Daniel*, 333 U. S. 118; *Schuylbacher*

v. *United States,* 334 U. S. 182. Moreover, as the Commission has consistently recognized, the existence and exercise of jurisdiction to approve the entire transaction covering both intrastate and interstate operating rights is essential in order that carriers may not accomplish by indirection or in piecemeal fashion results which they could not lawfully accomplish directly.

II

The court below clearly did not abuse its discretion in denying appellants' motion to amend their complaint under Rule 15 (a) of the Federal Rules of Civil Procedure. While this Rule is to be construed liberally, such a motion is not to be granted as a matter of course, but only "when justice so requires."

Appellants expressly disavow any negligence or inadvertence and assert, in substance, that, in the absence of a showing of prejudice to other parties, it is an abuse of discretion for a district court to deny permission to amend at any time and for any purpose, even though the change represents an entirely new theory of action. On the contrary, the interests of justice would not be served by a construction of Rule 15 (a) which would permit *seriatim* attacks on Commission orders without any showing of lack of knowledge, mistake, inadvertence or other justification. Cf. *Grubb* v. *Public Utilities Commission,* 281 U. S. 470. *Schick* v. *Finch,* 8 F. R. D. 639, 640 (S. D. N. Y.). Such a construction would result in prejudicial delays contrary to the statutory policy that Commission orders be reviewed speedily. *United States* v. *Griffin,* 303 U. S. 226.

ARGUMENT

I

THE COMMISSION HAD JURISDICTION OVER THE TRANSACTION UNDER SECTION 5 OF THE INTERSTATE COMMERCE ACT

A. THE LANGUAGE AND PURPOSE OF SECTION 5 REQUIRE THAT IT BE APPLIED TO THIS TRANSACTION

Section 5 (2) (a) of the Interstate Commerce Act provides in relevant part that it shall be lawful, with the approval and authorization of the Commission, "for any carrier * * * to acquire control of another through ownership of its stock or otherwise * * *." Both the Commission and the court below found that a transaction whereby a carrier (Pacific) proposed to transfer part of its interstate and intrastate operating rights to a non-carrier (Golden Gate), which thereupon would become a carrier, and, in exchange, would concurrently acquire control of the latter through acquisition of all its outstanding stock, required approval by the Commission under Section 5 (2) (a). It is submitted that such a transaction falls squarely within the language of Section 5 (2) (a) and that Commission approval of such a transaction is necessary if it is to "control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system." *Schwabacher* v. *United States*, 334 U. S. 182, 192.

Essentially, the attack made on the Commission's jurisdiction in this case is that Golden Gate is not an existing carrier and that Section 5 (2) (a) applies

only to mergers, consolidations or acquisitions of control of carriers already in existence. While no such restriction appears in the language of the statute, it is said that such a construction is required by its legislative history.

In determining the jurisdiction of the Commission under Section 5 (2) (a), however, the test, as every relevant Commission report and court decision makes plain, is the control relationships which will result from carrying out the terms of the *proposed transaction.* If the result of a proposed transaction will bring about any of the various control relationships described in Section 5 (2) (a), then jurisdiction attaches. This is true no matter what the status of the parties might have been prior to the transaction.

This Court has considered the scope and purpose of Section 5 on a number of occasions. While none of these cases has involved an acquisition of control resulting from a segregation of operating rights into a fully controlled subsidiary, they clearly hold that jurisdiction under Section 5 depends upon the relationship which will exist upon consummation of the proposed transaction.

In these cases, the jurisdictional question has involved whether there could be an acquisition of control within the meaning of that phrase in Section 5 (2) (a) where, by reason of pre-existing relationships, one carrier already enjoys substantial control over another through stock ownerships or subsidiaries. The issue was whether upon consummation of the proposed transaction any new or additional control

would result. Thus in *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, the Court held that a transaction involving a proposed lease of carrier properties already subject to the control of the applicant through stock ownership constituted an acquisition of control within the meaning of Section 5. In *United States* v. *Marshall Transport Co.,* 322 U. S. 31, it was held that a transaction which would result in a non-carrier obtaining control of another carrier through an acquisition by a carrier already controlled by the non-carrier required the non-carrier to obtain approval of the Commission under Section 5. In applying Section 5 to such a proposed transaction, the Court said (322 U. S. at pp. 38–39):

> It [the statute] has in the broadest terms prohibited the effectuating of "control or management * * *, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company * * *, or in any other manner whatsoever." § 5 (4). "Control or management" is defined to include "the power to exercise control or management." § 5 (4). The control or management whose acquisition is prohibited unless the approval of the Commission is secured is that which is obtained "in any * * * manner whatsoever" "however such result is attained, whether directly or indirectly," § 5 (4). It includes "actual as well as legal control," § 1 (3) (b), and "the power to exercise control or management," § 5 (4).

Looking again to the end result, this Court recently held in *Allegheny Corp.* v. *Breswick & Co.,* 353 U. S.

151, that the proposal to merge the Jeffersonville into the Big Four, even though the Big Four owned all of the stock of the Jeffersonville, constituted an acquisition of control requiring Commission approval under Section 5 (2) (a).

In all these cases, in determining the jurisdictional question, the Court took into consideration the pre-existing relationships solely for the purpose of determining whether there would be created a new relationship requiring the Commission's approval. In each case it found that by reason of what was proposed there would be an acquisition of control upon consummation of the proposed transaction. Precisely the same test applies here, and Commission approval under Section 5 (2) (a) is required because when the transaction is carried out Pacific will acquire control of Golden Gate, a new but separate carrier.

There is no suggestion in Section 5 that the Commission's jurisdiction to approve or disapprove control relationships is limited by the method by which or the time at which such control relationships are created. On the contrary, all that Section 5 provides is that if, as in the instant case, the transaction will result in one carrier acquiring control of another, Commission approval is required. That Section 5 (2) (a) is not restricted in its application to carriers already in existance or to any particular method of acquiring control is made plain when the provisions of Section 5 are considered as a whole.

Section 5 (2) (a) described what may lawfully be done with Commission approval. However, in determining what may lawfully be accomplished with

Commission approval, it is appropriate to look to what is made unlawful if accomplished without its approval, where, as here, the matter is dealt with in a separate provision. *United States* v. *Marshall Transport Co., supra.* This is particularly true where a remedial regulatory statute is involved and there is no suggestion that Congress sought to withhold from the Commission jurisdiction to approve any transaction which, if effected without its approval, would be unlawful.

Section 5, paragraph (4), declares that it shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a), or to accomplish or effectuate or to participate in accomplishing or effectuating the control or management in a common interest of any two or more carriers, *however such result is attained.* Unless it is concluded that under Section 5 (2) the Commission has authority to approve an acquisition of control of one carrier by another, however that result is obtained, paragraph (4) renders unlawful conduct done without Commission approval which the Commission, charged with regulating the industry, is without authority to grant even if it finds the proposal consistent with the public interest. There is no indication anywhere that such a result was contemplated, and the phrase "except as provided in paragraph (2)" clearly indicates that under paragraph (2), the Commission has authority to approve any transaction made unlawful by paragraph (4). In this connection, it should be noted

that the Commission, in its report in the instant case, called attention to the fact that "if the transaction were accomplished without prior authority it would be in violation of section 5 (4)" (R. 22–23).

The broad reach of Section 5 (2) is further confirmed by Section 5, paragraph (5), which provides that for the purposes of Section 5 "but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier * * *." It would be difficult to conceive of language which points more directly to the ultimate result of a proposed transaction as the yardstick for measuring jurisdiction.

Insofar as related provisions of the statute support the jurisdiction of the Commission under Section 5 (2) (a) to approve transactions involving both existing and resulting carriers, Section 5 (11) is most significant. This provision, which is discussed more fully below, provides in part that the authority conferred by Section 5 "shall be exclusive and plenary, and *any carrier* or corporation participating in or *resulting from any transaction approved by the Commission* thereunder, shall have full power * * * to carry such transaction into effect * * * without invoking any approval under State authority * * *." (Emphasis added.) The italicized language makes it

clear that the Commission's jurisdiction under Section 5 (2) (a) is not limited to transactions between existing carriers, but includes persons who will become carriers as a result of such transactions. As the Court below held (R. 113):

> We have no difficulty in finding that the proposed transaction is covered by the language of the section; it merely says that approval of the Commission is required when one carrier acquires control of another. That is precisely what the Greyhound Corporation and Pacific are seeking to do here; although Golden Gate will not attain the status of a carrier until the operating rights of Pacific are transferred to it, neither will the parent corporations acquire control until then, for the properties and operating rights are to be simultaneously exchanged for the stock.

B. SUCH A CONSTRUCTION OF SECTION 5 IS SUPPORTED BY THE COMMISSION'S CONSISTENT ADMINISTRATIVE INTERPRETATION SINCE 1940

The Commission's jurisdictional ruling in this proceeding does not represent any new departure; rather it is a reaffirmation of a construction of Section 5 repeatedly made since 1940 in a number of proceedings involving transactions seeking Commission approval to segregate substantially dissimilar operations into separate but controlled companies. *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.*, 35 M. C. C. 531 (1940), which the Commission cited in its report (R. 23), involved applications for authority for Columbia Terminals Company to acquire the

capital stock of Columbia Motor Service Co., a new corporation, and for the latter to acquire from Terminals certain property and interstate and Missouri intrastate contract carrier operating rights. The purpose of the transactions was to enable Terminals to segregate in separate companies its common carrier and contract carrier operations, and thereby remove the objections of Missouri officials to conduct of common carrier and contract carrier operations by a single operator. The Commission held that this matter was within its jurisdiction under Section 5 (2), stating as follows (pp. 534–535):[2]

> As the proposed purchase by Motor Service of the previously described motor-carrier properties of Terminals and the contemporaneous acquisition of control of the former by the latter are in reality a single transaction, involving acquisition of control of a motor carrier through stock ownership, the matter is subject to our prior approval under section 213, and our findings relate to the entire transaction. Compare *Boyle Bros., Inc.—Control—Speedway Transp. Co., Inc.*, 35 M. C. C. 45, and *Clardy—Control—Bulk Haulers, Inc.*, 35 M. C. C. 93.
>
> * * * * *
>
> Under the proposed transaction, dual operations formerly conducted by a single entity, and found by division 5 to be consistent with the

[2] Prior to 1940, acquisitions of motor carriers were governed by Section 213 of the Interstate Commerce Act. By the National Transportation Act of 1940, 54 Stat. 898, Section 213 was deleted, and all acquisitions, regardless of the type of carrier, were put under Section 5, which originally applied only to railroads.

> public interest within the meaning of section 210, would henceforth be performed by separate companies under common control. To this extent, what is proposed is not in accord with our policy to encourage corporate simplification wherever possible. However, since the arrangement appears to afford the only practicable solution for elimination of continued conflict with the Missouri authorities, and otherwise appears to be consistent with the public interest, under the circumstances here present the transaction will be approved.[3]

Similarly, in *Consolidated Freightways, Inc.—Control—Consolidated Convoy Co.*, 36 M. C. C. 358 (1941), Freightways was authorized to transport general commodities and automobiles and trucks in truck-away and drive-away service. Freightways sought and obtained approval of the Commission for acquisition of control through stock ownership of Convoy, a new corporation, which would acquire and conduct the truck-away and drive-away business. The Commission noted (p. 360) the managerial factors prompting the proposed transactions:

> The truck-away and drive-away operation is a specialized service, and, as stated, it has been conducted separately from Consolidated's gen-

[3] Appellants' supplemental brief refers to the fact that subsequent to this proceeding authority was sought from the Missouri Commission to transfer the intrastate operating rights involved. While we discuss this aspect of the case more fully *infra* at pp. 25–33, Section 5 (11) expressly relieves a carrier from seeking such approval. Moreover, there is nothing in the Missouri Commission order to indicate that what was involved was anything other than a formal transfer designed to give state recognition to the already consummated sale.

> eral-commodity operation. Different types of equipment are used, and separate offices have been maintained. The bulk of such business is with one automobile manufacturer. In such operation, leased vehicles, driven by their owners, are generally used, and, as the owner-drivers' compensation is computed on a basis different from that of other drivers, difficulty has been experienced with union drivers employed in the general-commodity operation. * * *

In approving the transactions, the Commission held (p. 359):

> As the proposed purchase and contemporaneous acquisition of control are in reality a single transaction, involving acquisition of control of a motor carrier through stock ownership, the matter is subject to our prior approval under section 5, and our findings relate to the entire transaction. Compare *Columbia M. Service Co.—Purchase—Columbia Terms. Co.*, 35 M. C. C. 531.

In *Takin—Purchase—Takin Bros. Freight Line, Inc.*, 37 M. C. C. 626 (1941), the Commission held that it had jurisdiction over a transaction which involved the purchase by a non-carrier partnership of certain operating rights from a corporation controlled by the partnership. The Commission stated (p. 627):

> As above indicated, the partnership does not engage in transportation in interstate or foreign commerce and is therefore not a motor carrier within the meaning of the act. However, consummation of the instant transaction would make it such a carrier owned equally by Blanche and L. J. Takin, who would continue to control

> the corporation through stock ownership. Under the circumstances, the transaction is one requiring our prior approval under section 5. Compare *Columbia M. Service Co.—Purchase—Columbia Terms. Co.*, 35 M. C. C. 531, and *United Parcel Service of Portland—Purchase—Wiese*, 37 M. C. C. 473.

In substance, the transactions involved in the *Takin* case also involved the segregation, for managerial reasons, of intrastate operations in the partnership and interstate operations in the corporation.

A similar situation was involved in *Gehlhaus and Hollobinko—Control*, 60 M. C. C. 167 (1954), in which corporation A was engaged in both motor carrier and water carrier operations. Acting under Section 5, the Commission approved A's acquisition of control through stock ownership of corporation B and A's transfer to B of its motor carrier operating rights and assets to be used by B in conducting the motor carrier operations. In its report, the Commission referred to the business considerations prompting these transactions as follows (p. 170):

> The performance of both types of service by Boat Line has resulted in some confusion to the traveling public, more particularly with respect to the motor-carrier operations. The dual service by the same carrier has also resulted in various other complications, including the maintenance of separate accounting records and in personnel management relations. Difficulty has been encountered in properly apportioning expenses between the separate divisions. Applicants' stockholders and offi-

> cials believe that separation of the motor-carrier functions from those relating to the water-carrier operations, as here proposed, would tend to eliminate existing confusion, permit more efficient management, and result in an improved bus and water-carrier service.

As to its jurisdiction to approve these transactions, the Commission held (p. 169):

> The proposed purchase and contemporaneous acquisition of control of Bus Line through the acquisition of its capital stock by Boat Line are, in reality, a single transaction, involving the acquisition of control of a motor common carrier by another carrier, and the matter is subject to our prior approval under section 5, and our findings relate to the entire transaction. Compare *Consolidated Freightways, Inc.—Control—Consolidated*, 36 M. C. C. 358, *Hogshire—Control—N. B. & C. Motor Lines, Inc.*, 35 M. C. C. 33, and *Stearns—Control—Massachusetts SS. Lines, Inc.*, 45 M. C. C. 647.

In brief, the Commission has consistently held that Section 5 requires its approval of transactions which will result in one carrier acquiring control of another carrier. The Commission has repeatedly exercised this jurisdiction under Section 5 to approve the acquisition of control of one carrier by another where the intended result of the transaction was to segregate for obvious managerial reasons different types of transportation operations. In this case, as in its prior decisions discussed above, the Commission has recognized the advantages of separate management for different types of transportation operations as a

valid ground for the exercise of its powers under Section 5 (2) (b). The Commission's consistent construction of Section 5 is both reasonable and conducive to fostering an efficient national transportation system. This Court has recognized that such an interpretation by the agency charged with the day-to-day administration of the Interstate Commerce Act is entitled to great weight. *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

C. JUDICIAL DECISIONS UNDER COMPARABLE PROVISIONS OF THE CIVIL AERONAUTICS ACT SUPPORT THE COMMISSION'S JURISDICTION HERE

The Commission's view that Section 5 is not limited to transactions between existing carriers, but applies as well to transactions which, when consummated, will result in one carrier acquiring control of another, finds strong support in judicial decisions under comparable provisions of the Civil Aeronautics Act. Section 408 of that Act (49 U. S. C. 488) provides in part:

> (a) It shall be unlawful, unless approved by order of the Board as provided in this section—
>
> * * * * *
>
> (5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever; * * *.

Section 408 (b) provides that any person seeking approval of a transaction specified in subsection (a) shall present an application to the Board.

In *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F. 2d 810 (C. A. 2, 1941), review was sought of an order of the Civil Aeronautics Board, which granted an application of American Export Airlines, Inc., for a certificate of public convenience and necessity for temporary air transportation between the United States and Lisbon, but dismissed that part of the application which sought the Commission's approval under Section 408 (b) of the Civil Aeronautics Act of the control of applicant by its parent American Export Lines, Inc. (a steamship corporation). American Export Lines was a common carrier and owned seventy percent of the stock of American Export Airlines. The latter proposed to engage in business as an air carrier but was not an air carrier when it filed application with the Board asking for approval of its control by American Export Lines, if such approval were deemed necessary. The Board dismissed the application upon the ground that Section 408 (a) (5) "applies to cases involving the control of air carriers only where the acquisition of control of a corporate entity occurs at a time when that entity is already an air carrier." The Court of Appeals for the Second Circuit, in an opinion written by Judge Augustus N. Hand, rejected this interpretation of the statute as one that was too literal and would defeat the statutory objectives. The court stated (p. 815):

> This seems to us an unduly literal interpretation of subdivision (5). In our opinion "to acquire control of any air carrier in any manner whatsoever" is to take all steps involved

> in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation. Any other interpretation would enable a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408 (b) that the "Authority shall not enter * * * an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carriage to use aircraft to public advantage in its operation and will not restrain competition."

The court therefore concluded (p. 816) that "the Board ought not to have dismissed the application but should have proceeded to deal with it on the merits."

In *National Air Freight Forwarding Corp. v. Civil Aeronautics Board*, 197 F. 2d 384 (C. A. D. C., 1952), the court reached a similar determination that the statute confers on the Board jurisdiction, not only over a carrier that is seeking control of another carrier already in existence, but also over all the steps preliminary to bringing this second carrier into existence. In this case, National Air Freight Forwarding Corp. attacked that part of the Board's order which denied it operating authority as a freight forwarder on the ground that it was controlled by a railroad. In upholding the Board and rejecting the contention of the petitioner that Section 408 was inapplicable since this was not the case of a common carrier acquiring control of an air carrier, because the control was

acquired of a company simply established to become an air carrier, the court stated (p. 386):

> While there is no doubt that § 408 applies where a common carrier acquires control of an established air carrier, the parties dispute its application where, as here, control is acquired of a newly organized company applying to enter the air transportation field for the first time. Since such a company is not an air carrier until a certificate has been issued, it would appear at first blush that its relationships to other types of carriers are not subject to the restriction of § 408. It has been held, however, in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 2 Cir., 1941, 121 F. 2d 810, that the very process of certification brings the control relationships between the newly certificated air carrier and its parent within § 408. Otherwise a common carrier seeking entry into the air transportation field would be able to evade § 408 merely by organizing a subsidiary and causing it to apply for a certificate of public convenience and necessity under § 401. We agree with the Pan American decision that it would be unwise for the Board to close its eyes to the fact that with completion of the certification process, there would be in existence an air-surface carrier control relationship which important segments of the Act were designed to regulate.

Appellants' attempt to distinguish the rationale of these cases will not stand analysis. On the contrary, as the court below pointed out (R. 116): "The reasoning of Judge Hand is equally applicable here." Concededly different considerations apply to different

modes of transportation in determining whether a particular merger or acquisition of control is consistent with the public interest. But whatever these factors may be, the common purpose of these comparable provisions is to subject such acquisitions to the prior approval of the appropriate regulatory agency. And in this connection, the courts held there was jurisdiction under Section 408 where the carrier sought to be controlled would become an air carrier only upon consummation of the transaction.[4] It is under precisely the same reasoning that the Commission ruled it had jurisdiction in the instant proceeding under Section 5 (2) of the Interstate Commerce Act.

D. THE COMMISSION'S JURISDICTION UNDER SECTION 5 EXTENDS TO BOTH THE INTRASTATE AND INTERSTATE OPERATIONS OF A CARRIER

In the preceding parts we have shown that, under Section 5 (2) (a), Commission approval is required of a proposed transaction whenever it appears that upon consummation one carrier will acquire control of another. In this part, we consider appellants' general contention that the Commission is without authority to approve this transaction because mostly intrastate rights are involved which are subject to state supervision and control. Not only is appellants' reliance

[4] The portion of Section 408 (b) referred to in appellants' brief (p. 42) applies only to applicants, that is, the party seeking control, and therefore has no bearing in determining whether the party to be controlled is or will be an air carrier upon consummation of the transaction — the issue before the courts in the CAB cases discussed above.

on Section 212 (b) misplaced, but essentially the argument advanced constitutes an attack on the Commission's findings to support its conclusion that the proposed transaction is consistent with the public interest, an issue not before this Court.

The transactions approved by the Commission involve the transfer to Golden Gate of Pacific Greyhound's intrastate operating rights as well as the transfer of the related interstate rights. The Commission recognized that in this case the intrastate rights are predominant. But in the absence of some legislative limitation, the question of jurisdiction under Section 5 does not turn on some arbitrary formula pertaining to the amount of the intrastate versus interstate operations involved. Indeed, appellants concede (Br. 29) that "If Golden Gate were presently conducting the operations in question, and if it were to go to the Interstate Commerce Commission with a plan for merger or consolidation with Pacific Greyhound, the proposal would fall squarely within the purpose and language of Section 5 (2)".

Section 5 (2) (a) gives the Commission jurisdiction over acquisitions of control of carriers subject to the Interstate Commerce Act without any limitation of that jurisdiction to interstate operations. If the Act said nothing more, the practical impossibility of separating the interstate and intrastate operations of many carriers would preclude reading such a limitation into Section 5 (2) (a). However, the matter is made crystal clear by Section 5 (11), which not only provides generally that "The authority conferred by

this section shall be exclusive and plenary", but specifically commands that:

> * * * any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * *.

Thus, Section 5 (11) provides in terms that the parties to transactions approved by the Commission under Section 5 may operate properties and exercise franchises acquired in such approved transactions without regard to any restrictions or prohibitions of state or municipal law which might be applicable in the absence of such approval. This language would be meaningless unless it referred to state or municipal franchises

to conduct intrastate operations, since interstate operating rights would not be subject to local law in any event. It follows, from the statutory language alone, that the Commission had authority to approve or disapprove the acquisition by Golden Gate of Pacific's intrastate rights.

Moreover, this Court has recognized that, by reason of Section 5 (11), where jurisdiction attaches under Section 5 (2) (a), the transaction may be consummated in a manner inconsistent with state law, even though it may affect matters normally committed to state control. In *Seaboard R. Co.* v. *Daniel,* 333 U. S. 118, this Court, in sustaining a Commission order authorizing a Virginia corporation to acquire a railroad system in six states, including South Carolina, held that the Commission's order relieved the Virginia corporation from compliance with the laws of South Carolina forbidding the ownership of railroads in the state by foreign corporations. In *Schwabacher* v. *United States,* 334 U. S. 182, which likewise dealt with the effect of state laws in Section 5 proceedings, the Commission had approved, pursuant to Section 5 (2), the voluntary merger of the Pere Marquette Railway Company, a Michigan corporation, and the Chesapeake & Ohio Railway Company. The order was attacked by certain preferred stockholders of Pere Marquette, who maintained that the terms of the merger did not accord them rights granted by the corporate charter and pertinent state law. The Commission took the position that the merger terms were just and reasonable as to all stockholders and

that if such terms deprived any stockholders of contract rights which they had under the railroad's charter and the law of Michigan, such stockholders would have to seek redress in the Michigan courts, since the Commission could not determine the legal rights of the stockholders. This Court held that the Commission had construed too narrowly the relief provided by Section 5 (11), that approval of a merger under Section 5 is not conditioned upon observance of state laws, and the Commission may not grant approval which is contingently subject to rights given by state law. The Court said that when the conditions prescribed by Section 5 are met, that is, that the transaction be consistent with the public interest, be just and reasonable, and the required number of stockholders have approved, "the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State or municipal * * *'." 334 U. S. at 194–195. And compare *Texas* v. *United States,* 292 U. S. 522, where a similar conclusion was reached under the immunity provision in Title II of the Emergency Railroad Transportation Act of 1933.

With respect to the power of the Commission to approve transfers of intrastate rights which are involved in a transaction coming under Section 5, *New England Greyhound Lines* v. *Powers,* 108 F. Supp. 953 (D. R. I.) is significant. There the court held that the Interstate Commerce Commission had authority to approve the purchase by one carrier of both the

interstate and intrastate operating rights of another carrier, even though the acquisition of the intrastate rights was expressly forbidden by state law. New England Greyhound Lines and its parent Greyhound had obtained from the Commission, pursuant to provisions of Section 5, authority to acquire both the interstate and intrastate operating rights of another carrier. Following the acquisition, New England Greyhound applied to the state authorities of Rhode Island for approval of the transfer of the intrastate certificate from the vendor to it, but the application was disapproved on the ground that the constitution and general laws of Rhode Island prohibit the holding of an intrastate certificate by a corporation which is not specially chartered by an act of the Rhode Island General Assembly. New England Greyhound subsequently filed an action for declaratory judgment to remove the cloud on its right to the intrastate certificate. In granting judgment for the plaintiff, the court held that once the Commission had approved the acquisition of the interstate and intrastate operating rights, no state laws could override the determination of the Commission. In so holding, we submit that the district court correctly applied the rationale of this Court's decisions in *Texas* v. *United States, Seaboard R. Co.* v. *Daniel,* and *Schwabacher* v. *United States, supra.*

Under the principle announced in those cases, it is clear that the Commission had full authority to approve or disapprove the acquisition by Golden Gate of the intrastate rights of Pacific Greyhound, even

assuming that there are state laws which prohibit such an acquisition or require permission from the state for transfer of the rights. Indeed, the Commission has held consistently that where a transaction is subject to Section 5 (2) the Commission's plenary jurisdiction covers both interstate and intrastate operating rights. Such a construction of Section 5 is compelled not only by the language of paragraph (11) but also by the practical necessities of effective regulations in the public interest. If the Commission's jurisdiction over a sale and purchase were confined to the interstate rights, the Commission could not properly determine whether the terms of the transaction considered as a whole were reasonable, the effect of the transaction on the purchaser's financial stability, the consequence of the transaction on adequate and economical transportation in the territory, and other matters affecting the public interest. Furthermore, if the Commission did not have jurisdiction over the sale and purchase of intrastate operating rights, such transactions could be used as vehicles for a carrier to obtain a monopoly in interstate operations without power in the Commission to prevent this. For example, if two carriers had duplicating interstate rights, one of them could secure a monopoly without the Commission's approval by the device of acquiring the intrastate rights and physical properties of the other and by the latter agreeing to abandon its interstate operations.

The Commission set forth its interpretation of Section 5 in *Wilson Storage & Transfer Co.—Purchase—*

Dakota Transp., 36 M. C. C. 221 (1940). There two interrelated contracts, one for the purchase of the vendor's interstate rights and the other for the purchase of his corresponding intrastate rights, provided that the vendor should continue its interstate operations until Commission approval of the transaction was obtained, but that the entire purchase price should be paid upon approval of the transfer of the intrastate rights by the appropriate state authorities. As soon as the state authorized transfer of the intrastate rights, the vendee paid the entire purchase price and commenced intrastate operations, and the vendor continued its interstate operations. The Commission held that since it had jurisdiction over all of the transaction, consummation of a part was illegal. It said (pp. 226–227):

> It is evident that the two instruments above described embrace a single transaction. It is also apparent that the parties have consummated that portion of the transaction relating to purchase of the intrastate operating rights in advance of approval of the transaction by us, under the erroneous impression that such consummation might lawfully be effected. We are of the opinion that our jurisdiction under section 5 extends to the entire transaction and to all of the "properties" covered by such transaction and not alone, as the parties here apparently believed, to the purchase of rights to operate in interstate or foreign commerce; and that no part of a transaction, when such transaction is subject to the requirements of section 5, may lawfully be consummated without our prior approval.

In *Buckingham Transp. Co. of Colo., Inc.—Purchase—Fast Frt.*, 36 M. C. C. 313 (1940), the Commission reaffirmed its construction of Section 5 in rejecting the contention of the carriers that the Commission lacked jurisdiction over the intrastate rights which were involved. In that case, Buckingham Transportation Company and the Fast Freight Lines entered into two contracts, one covering purchase of the vendor's intrastate rights and the other purchase of its interstate rights. The transfer of the intrastate rights was approved by the appropriate authorities. The Commission, however, disapproved the transaction *in toto* on the ground that it was not consistent with the public interest and rejected the contention that it lacked jurisdiction over the purchase of the vendor's intrastate rights. Referring to Section 5 (11), and the *Wilson Storage* case, the Commission stated (p. 317):

> It is apparent that applicant has unlawfully consummated purchase of all of the properties of vendor, a motor carrier; and, with respect to applicant's contention as to the limits of our jurisdiction, we are of the opinion that our jurisdiction under section 5 extends to the purchase transaction in its entirety, including all of the operating rights and properties concerned, and not solely to purchase of interstate operating rights.

See also *Raymond Bros. M. Transp., Inc.—Purchase—North American*, 37 M. C. C. 431; *Takin—Purchase—Takin Bros. Freight Line, Inc.*, 37 M. C. C. 626.

These cases serve to demonstrate the inapplicability of Section 212 (b) to a transaction which involves not only the transfer of interstate and intrastate operating rights but also the simultaneous acquisition of control of one carrier by another carrier. That Section provides: "Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe." However, under Section 5 (2) and (10) such an acquisition of control of one carrier by another would be governed by Section 212 (b) only if the aggregate number of vehicles involved did not exceed 20, which is not the case here. *United States* v. *Resler,* 313 U. S. 57.

Appellants concede that the Commission could not have approved the instant transaction under Section 212 (b). We agree. But it does not follow that there is a void in regulatory authority. On the contrary, as this Court pointed out in the *Resler* case, the two sections must be read together, and when this is done it is plain that they confer jurisdiction on the Commission to approve every kind of transaction which may involve the transfer of operating certificates issued by it. Section 212 (b) was designed to cover less complicated transactions, essentially small ones, *Stearn* v. *United States,* 87 F. Supp. 596, 602 (D. C. W. D. Va.). In such cases, the Commission may establish reasonable rules and regulations not necessarily containing all of the detailed conditions in Section 5. However, an applicant for authority under Section 212 (b) has the burden of establishing that the

transaction is not subject to the provisions of Section 5. *Dean and Dove—Purchase—Dean,* 51 M. C. C. 376, 381.

On the other hand, transactions *not* falling under 212 (b) are covered by Section 5. As the Commission observed in *Atwood's Transport Line—Lease—John A. Clarke,* 52 M. C. C. 97, 107–108:

> * * * Section 5 is principally concerned with the bringing of two or more carriers under control or management in a common interest. * * * It is for the Congress to enact legislation, and it has seen fit to draw a definite line of distinction between transfers of certificates *not involved in a transaction which is subject to section 5,* and the control of two or more motor carriers of sufficient size to be subject to section 5, where the transfer of a certificate may be involved. [Emphasis added.]

Since Pacific will admittedly acquire control of Golden Gate and of the substantial operating rights which it will possess upon consummation of the proposed transaction, it is clear that the Commission properly exercised jurisdiction under Section 5.

Finally, with respect to the jurisdictional issue, we observe that in large measure, appellants' argument constitutes an attack on the adequacy of the Commission's findings to support its order on the merits. We refrain from commenting on these contentions, since the complaint raised only the jurisdictional question, and the record before the Commission is not before the Court. "The settled rule is that the findings of the Commission may not be assailed in

the absence of the evidence upon which they were made." *Mississippi Valley Barge Lines Co.* v. *United States,* 292 U. S. 282, 286.

II

DENIAL OF THE MOTION TO AMEND THE COMPLAINT WAS NOT AN ABUSE OF DISCRETION

The appellants also contend that the district court abused its discretion in denying their motion for leave to amend their complaint in order to challenge the Commission's finding that the transaction between Pacific and Golden Gate was consistent with the public interest. The motion was made under Rule 15 (a) of the Federal Rules of Civil Procedure which provides in relevant part that "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

The contested ruling by the court must be considered in the context of this proceeding. Before the Commission, appellants, who have been represented by the same attorney throughout, objected to grant of the application involved in this appeal on the grounds that the proposed transaction (1) was not within the scope of Section 5, and, (2) was not consistent with the public interest. After the Commission had issued its report and order granting the application, appellants were free to seek judicial review of the jurisdictional ruling, the ruling on the merits, or both;

but the complaint which they filed raised only the jurisdictional question. After an answer to the complaint and cross motions for judgment on the pleadings had been filed, the jurisdictional issue was argued before the three-judge district court. In the course of this argument, appellants' counsel for the first time stated that he desired leave to amend the complaint to challenge the Commission's "public interest" determination in the event the court should rule against appellants on the jurisdictional issue.

Appellants filed their motion for leave to amend five days after argument of the jurisdictional question, and attached to the motion a proposed amendment which attacked, as lacking evidentiary support, the Commission's finding that the transactions which it approved were consistent with the public interest, and similarly challenged many of the Commission's subsidiary findings (R. 74–77). In other words, appellants proposed that a complaint limited to the question of the Commission's jurisdiction should be converted, by amendment, to an all-out assault on the Commission's action. Grant of their request would have required, at the minimum, the filing of amended answers, production of the record before the Commission, preparation of additional briefs, and further argument before the court on the questions raised by the amendment.

Under Rule 15 (a) a motion to amend a complaint after responsive pleadings are filed is addressed to the discretion of the court unless it is consented to by the adverse parties. Appellants argue, in effect,

that under this Rule justice requires that permission be granted almost as a matter of course if, on second thought, an attorney decides, when a case is ready for final disposition, to interject new issues in the event the issue originally raised is found wanting in merit. Under appellants' theory, the plaintiff does not have the burden of justifying his belated action, but the defendants have the burden of showing that they would be prejudiced by the ensuing delay or otherwise adversely affected.

While the Rule provides that leave shall be freely given when justice so requires, a motion is not to be granted as a matter of course but must be determined in the light of all the surrounding circumstances. *In re Hudson & Manhattan R. Co.*, 229 F. 2d 616, 621 (C. A. 2). In this case the last minute attempt to amend was not based on lack of knowledge, oversight or mistake, factors which the courts have consistently taken into consideration in exercising discretion under this Rule. Rather, appellants' counsel candidly acknowledged that what he sought was a bite from another apple if the first turned out to be sour. But if this is a sufficient ground for amending a complaint, the door is opened to *seriatim* attacks on Commission orders, and a technique is available for delaying the operative effect of its orders.

This Court has held that a party who had full knowledge of all the grounds upon which the order of a regulatory agency might be attacked may not prosecute his appeal in a piecemeal fashion. In

Grubb v. *Public Utilities Commission*, 281 U. S. 470, the primary question presented was whether the State Supreme Court decision upholding a report and order of the Public Utilities Commission of Ohio was *res judicata* in a federal district court proceeding which sought to litigate the same questions between the same parties. However, in the federal court proceeding an attempt was made to raise an issue which had not been raised in the state court proceeding. After noting that the appellant had personal knowledge of this additional factor at the time of the initial hearing before the State Commission, at the time he applied for a rehearing, and that it could also have been raised in the State Supreme Court, this Court said (281 U. S. at 478–479):

> The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. [Citing cases.]
>
> As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also

> as respects any other available matter which might have been presented to that end.

By the same token, it is submitted that under a most liberal construction of Rule 15 (a), justice does not require that litigation be conducted in a piecemeal fashion. On the contrary, as the Court said in *Schick* v. *Finch*, 8 F. R. D. 639, 640 (S. D. N. Y.), in denying a motion for leave to serve an amended answer:

> A liberal policy does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted. The instant case, I believe, falls into such a category. It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters which, if true, must have been within the defendant's knowledge when the controversy arose.

See also, *Friedman* v. *Transamerica Corp.*, 5 F. R. D. 115, 116 (D. Del.).

Appellants attempt to assimilate their motion to amend to a situation where a court holds the allegations of a complaint insufficient to state a cause of action and thereafter permits an amendment almost as a matter of course. This approach fails to take into account that an order of the Interstate Commerce Commission is issued only after the rights of

the parties have been determined after a full hearing in an administrative proceeding. Thus, there is little similarity to the situation where, unless amendment is permitted, the plaintiff will be deprived of opportunity to have his complaint heard.

Moreover, under the Urgent Deficiencies Act, Congress provided a method of judicial review of orders of the Commission possessing, as this Court has said, "extraordinary features." *United States* v. *Griffin*, 303 U. S. 226, 232. The original hearing in the district court is before three judges, one of whom must be a circuit judge; from their decision a direct appeal lies to this Court; and "[u]pon both the trial court and the Supreme Court rests the obligation to give the case precedence over others." 303 U. S., at 232. As this Court observed (*id.*, at 233): "In such cases Congress sought to guard against ill-considered action by a single judge and to *avert the delays ordinarily incident to litigation.*" (Emphasis added.)

The obligation to "avert the delays ordinarily incident to litigation" is a two-way street. We submit that in the circumstances of this case the district court did not abuse its discretion in refusing to permit appellants to amend their complaint.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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Interstate Commerce Commission.

APRIL 1958.

APPENDIX

Statute and Rule Involved

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, are as follows:

> Section 1. (3) (b) For the purposes of sections 5, 12 (1), 20, 204 (a) (7), 210, 220, 304 (b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.
>
> * * * * *
>
> Section 5. (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a

person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

* * * * *

SECTION 5. (4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

SECTION 5. (5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

* * * * *

SECTION 5. (10) Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a trans-

action within the scope of paragraph (2) where the only parties to the transaction are motor carriers subject to part II (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1 (3)), and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to part II, does not exceed twenty.

* * * * *

SECTION 5. (11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission,

and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * *

* * * * * *

SECTION 212. (b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

Rule 15 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. 2072, provides:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

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